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NO. 82-2075

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1982

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SUPREME COURT, U.S.

THE STATE OF ARIZONA,

Petitioner,

vs.

RICHARD F. YOUNG,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS,
STATE OF ARIZONA, DIVISION ONE

BRIEF OF RESPONDENT

THOMAS A. THINNES, P.A.
By Eleanor L. Miller
1005 North Second Street
Phoenix, Arizona 85004
Phone: 602-257-8408
Attorney for Respondent
Richard F. Young

QUESTIONS PRESENTED

1. Has the petitioner properly invoked this Court's jurisdiction, under 28 U.S.C. § 1257(3), on the hypnosis issue?
2. Is there any special or important reason, pursuant to the Rules of the United States Supreme Court, Rule 17.1, for this Court to grant a petition for certiorari on the hypnosis issue?
3. Is there any special or important reason, pursuant to Rule 17.1, for this Court to grant a petition for certiorari on the Fourth Amendment issue?

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OPINION BELOW

The opinion of the Arizona Court of Appeals, Division One, is reported at ____ Ariz. _____, 661 P.2d 1138 (1982). Petition for review in that case was denied by the Arizona Supreme Court in No. 5836-PR. Both are set forth in full in the petitioner's appended exhibits.

The trial court's orders of suppression regarding the hypnotized witness and illegally seized evidence are in Maricopa County Superior Court Number CR-106652 and are dated, respectively, August 14 and September 18, 1980. They are also set forth in petitioner's appended exhibits.

STATEMENT OF JURISDICTION

Petitioner contends this Court has jurisdiction of the hypnosis issue pursuant to 28 U.S.C. § 1257(3). Respondent disagrees, as is set forth more fully, infra.

Respondent agrees that, if a special or important reason were given for granting the writ of certiorari on the Fourth Amendment issue, this Court would have jurisdiction to do so pursuant to 28 U.S.C. § 1257(3).

The hypnosis issue was raised by a motion in limine, in Maricopa County Superior Court Number CR-106652, dated September 4, 1979. This motion was eventually granted on August 14, 1980.

The Fourth Amendment issue was raised, in Maricopa County Superior Court Number CR-106652, by a motion to suppress dated August 14th, 1980. This motion was granted on September 15, 1980.

The petitioner's petition for review was denied by the Arizona Supreme Court on March 29, 1983, not March 30.

Respondent otherwise concurs with petitioner's statement of jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

No other federal constitutional provisions, statutes or issues are presented in this case.

STATEMENT OF THE CASE

Richard Francis Young, a bartender at the Leprechan Lounge in Phoenix, Arizona, was charged with first degree murder on April 25, 1979, by a Maricopa County Grand Jury. The charge stemmed from the shooting of an individual named Don Jason. On October 26, 1978, Young and Jason became embroiled in a lengthy fight at the Leprechan Lounge. During the course of the fight, Young sustained several broken ribs and a broken finger. Jason, a much larger man than Young, sustained no injuries during the fight.

The fight was broken up when the barmaid, Diana Armstrong, called the police. While she was engaged in a conversation with the police, the two men agreed to stop fighting. Almost simultaneously, the owner of the bar, Grace Gillespie, entered the scene. No one else was on the premises, as the patrons had left when the fight began.

Young, Armstrong and Gillespie walked behind the bar where Gillespie directed Young to "cash out". As Young was doing so, Jason began to come around the end of the bar, making further threatening statements and gestures against Young. At that time, Young, who had removed a weapon from behind the cash register, a nightly habit when cashing out, shot Jason. The first shot spun Jason around and the second shot caught him in the upper right hand portion of his shoulder.

Immediately upon Jason falling into the men's restroom, Young placed the gun down on the top of the bar and said, simply, "call the police." The barmaid, Armstrong, left the bar premises to do just that. Gillespie did not call the police, although she later agreed that it was appropriate to have called them. Furthermore, Gillespie was not present in the bar when the police arrived. She had left and gone to a local grocery store where she called her own attorney. She was not present when the police arrived and she was not present for any of the course of their "investigation", i.e., warrantless search.

Only two police officers testified at the suppression hearing and both were called by the defense. The first officer who arrived at the scene testified that he and one other officer arrived at approximately 9:45 p.m. They secured the scene within a matter of minutes. Phoenix Police Department detectives did not arrive until twenty to twenty-five minutes later. The detective who searched the bar testified that he did not arrive until 10:50 or 10:55 p.m. He also testified that he was aware that the scene had been secured before his arrival but, nonetheless, some

time after midnight, he conducted a thorough search of the premises without a warrant and without asking for or receiving the consent of anyone.

This detective testified that he observed a portion of the ceiling askew and saw the corner of a piece of cloth hanging there. He climbed up, removed a portion of the ceiling, and searched that area, finding the gun with which Young is alleged to have committed the crime. The detective testified that the gun was not plainly visible to him and that his only purpose in going into the ceiling area was to search.

At the suppression hearing, the issue of Young's standing to object to the warrantless search was raised, briefed, thoroughly argued and decided. Gillespie, the owner, testified that Young was a silent partner and had invested thousands of dollars in the bar. She testified that he had sold his own business and invested that money into the bar. She also testified that Young had not been paid for much of his work at the bar and that they had a verbal agreement that she would eventually sell the bar to Young, when the bar got "out of the red". She further testified that Young was much more than an employee and that she and Young were the only signatories on the bar's checking account.

Young also testified at the suppression hearing. He confirmed everything that Gillespie had testified to and specified that he had contributed to the bar approximately $3,000, plus the salary he had not been paid from May of 1978 to October of 1978. He also testified that his position at the bar included ordering the stock, hiring and

firing employees, running the business by working fourteen or fifteen hours a day, seven days a week, making improvements in the bar's service and physical premises, closing the bar every night and making the accounting for each day's proceeds. Young did not urge, nor did the trial court rely, in any way, on the personal friendship between Gillespie and Young in making the decision that Young indeed had standing to object to the warrantless search.

Armstrong, the barmaid, gave eight statements to the police subsequent to the incident. The last statement was given during the course of a three hour hypnosis session, during which she was surrounded by several police officers and the deputy county attorney prosecuting the case. While she was placed under the influence of hypnosis by a "specially trained police officer", the trial court found that the questions were actually asked, and the session primarily conducted by, the deputy county attorney, who had no training whatsoever in the field of hypnosis. While the petitioner maintains that hypnosis was successful in permitting Armstrong to recall details she had never previously recalled, Young has always taken the position that the hypnosis session significantly changed exculpatory statements Armstrong had previously made to the police. He has always contended, and still does, that the state tampered with a witness, by hypnosis, and improperly induced these changes.

The State of Arizona has also maintained that new information obtained from Armstrong under hypnosis was corroborated by her previous statements. However, the experts, both state and defense, agreed at the hearing on this issue that corroboration of "facts" learned during the course of hypnosis must be corroborated by an

independent source, not by the same individual giving the "facts". Some of the "new information" elicited from Armstrong in this hypnosis session was information that allegedly came from Young during a conversation with Armstrong. Needless to say, there is no way that those alleged statements by Young can be corroborated by an independent source, since no one else was present when they were allegedly made. Gillespie's alleged "corroboration" of information obtained from Armstrong is corroboration of absolutely irrelevant and unrelated information. On the other hand, Gillespie and Armstrong differ significantly on important details, such as what happened with the gun immediately after the shooting. While Armstrong and Gillespie originally agreed on that fact, after the hypnosis session, Armstrong changed her story entirely.

It should be noted here that the state's own expert agreed, during the course of cross-examination at the hearing on this issue, that there was, in fact, no need to hypnotize Armstrong in this case. She had never indicated any lack of recollection or memory block. Indeed, as is pointed out above, she had given many statements favorable to Young to the police before the hypnosis session took place. The only discernible purpose for the hypnosis session was to change the statements she had been giving to suit the petitioner's theory of the case.

At the conclusion of the hearing on the hypnosis issue, the trial court found that of the many changes in Armstrong's testimony objected to, at least three of them had never been corroborated, even by Armstrong's prior statements, and that no other witness and no other physical evidence corroborated

the "new facts". The trial court then went on, however, to refuse to treat the hypnosis issue as a new scientific technique pursuant to Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), although he had been urged by the defense to do so.

The trial court was required to reconsider this issue, however, after the Arizona Supreme Court ruled against the use of hypnosis in a case entitled State v. LaMountain, 125 Ariz. 547, 611 P.2d 551 (1980). The trial court, by a different judge, then agreed the testimony obtained through hypnosis could not be used at trial.

In an opinion filed on December 28, 1982, and attached to the petitioner's brief as Exhibit A, the Arizona Court of Appeals affirmed the trial court's order suppressing all physical evidence seized at the Leprechan Lounge, except photographs, which it held to be admissible subject to the satisfaction of normal foundational prerequisites. The Court also held, pursuant to the direction of the Arizona Supreme Court, in a definitive opinion regarding hypnotized witnesses, State ex rel. Collins v. Superior Court of the State of Arizona, In and For the County of Maricopa, 132 Ariz. 180, 644 P.2d 1266, Supplemental Opinion at 1279 (1982), that Armstrong could testify to pre-hypnosis statements if the trial court, after a hearing, determined the statements had been recalled and preserved prior to the hypnosis session. Thus, Armstrong was not precluded in a per se or arbitrary manner from testifying at the trial of this matter.

SUMMARY OF ARGUMENT

There is no jurisdiction, pursuant to 28 U.S.C.

§ 1257(3), for this Court to grant a writ of certiorari on the hypnosis issue, as that issue was decided on purely policy grounds in the Arizona courts.

No special or important reason has been offered by petitioner, nor does one exist, under Rule 17.1, for this Court to exercise its discretion and grant a writ on either the hypnosis or Fourth Amendment issues. The latter was correctly decided based upon the trial court record and this Court's decision in Mincey v. Arizona, 437 U.S. 385 (1978).

ARGUMENTS

A. The Hypnosis Issue Raises No Special Or Important Reason For This Court To Grant Certiorari, Nor Would This Court Have Jurisdiction Under 28 U.S.C. § 1257(3).

Nowhere in its brief does the petitioner state that there are reasons, pursuant to the Revised Rules of the Supreme Court of the United States, Rule 17.1, for this court to grant its petition for writ of certiorari on the hypnosis issue. Indeed, there are none. The Arizona Supreme Court in State ex rel. Collins v. Superior Court of the State of Arizona, In and For the County of Maricopa, supra, did not rely upon federal law, under the Sixth Amendment to the United States Constitution, or otherwise, to make its determination regarding the use of hypnotized witnesses in the courts of the State of Arizona. While the confrontation issue was one of the bases for the court's original opinion in that case, the court retreated significantly from that position in its supplemental opinion. Indeed, it began its analysis of the case, in the supplemental opinion, by stating the following:

> "To a large extent, the decision on use of hypnotically induced recall turns on the resolution of a single question of policy. The true issue is whether Frye [supra] should be applied to determine the basic reliability of the new technique as a prerequisite for use in the courtroom, thus leaving only foundational questions for the trial court, or whether the trial court should be left free to decide both basic reliability and foundational questions on a case-by-case basis."
>
> 644 P.2d at 1282.

The court made its policy decision by determining that Frye v. United States, supra, did apply to the new uses of hypnosis in criminal investigations. It made the following ruling.

> "[W]e . . . hold that a witness will not be rendered incompetent merely because he or she was hypnotized during the investigatory phase of the case. That witness will be permitted to testify with regard to those matters which he or she was able to recall and relate prior to hypnosis."
>
> 644 P.2d at 1295. [Emphasis in original].

The Arizona Supreme Court also set forth specific safeguards which it would require the proponent of hypnotized witnesses to follow. 644 P.2d at 1288-1292 and 1296.

No issue is presented to this Court regarding the Sixth Amendment right to confront and cross-examine witnesses. No issue is presented to this Court, even tangentially, regarding the other subsections of Rule 17.1. Thus, petitioner has presented to this Court no reason under that Rule or otherwise to grant the petition for certiorari on the hypnosis issue.

Aside and apart from the lack of reasons under Rule 17, however, it appears from the plain language of 28 U.S.C.

§ 1257(3) that no jurisdiction would lie in this Court on the hypnosis issue. Since neither of the pertinent Arizona appellate court decisions were based on any federal question, the last clause of 28 U.S.C. § 1257(3), upon which petitioner must rely, is not applicable to this case, in any way. There is no right or privilege to present questionable testimony obtained through the use of hypnosis at a trial, and the Arizona opinions do not, in fact, prevent such use in a per se manner. The Arizona opinions, furthermore, do not preclude, in any way, the use of hypnosis in criminal investigations.

The Sixth Amendment issue raised by petitioner in its brief was not decided by the Arizona courts. It is, therefore, not subject to a writ of certiorari. Illinois v. Gates, No. 81-430, decided June 8, 1983.

B. The Fourth Amendment Issue Raises No Special Or Important Reason For This Court To Grant Certiorari.

Petitioner attempts two arguments under one issue heading. First, it argues that the owner of the bar, in consenting to calling the police to the scene of the homicide, also consented to an extensive, thorough search of all of the premises. Gillespie did agree, at the suppression hearing, that it was proper to call the police to the scene. It simply does not follow, however, under the Fourth Amendment to the United States Constitution, or any case ever decided by this Court, that the owner of premises where a crime is committed consents to a search of the entire premises by calling the police to investigate the crime. Certainly, under such circumstances, the police may seize whatever evidence or contraband is in plain view. However,

in the instant case, the trial court found, and the Court of Appeals affirmed, that the petitioner had failed in its burden to show that any of the evidence seized was in plain view.

To follow the petitioner's argument to its logical conclusion, if an assault occurred in an individual's office, for example, and the individual called the police to the scene, he would have consented to a search of his desk drawers, his file cabinets, his books, his files, etc. Such an argument finds no support, under this Court's decisions, or the decisions of any other American jurisdiction.

The second argument that the petitioner makes is that Young did not possess an expectation of privacy in the premises searched, i.e., he had no standing to object to the warrantless search. Alternatively, petitioner argues that Young had no legitimate expectation of privacy in the ceiling of the bar. However, the finding of the trial court, after a lengthy suppression hearing, affirmed by the Arizona Court of Appeals, was that Young did, indeed, have standing to object to the warrantless search. Both courts found Young had a significant proprietary interest in the bar's premises. Young was not, as the petitioner attempts to convince this Court, a mere employee of the bar. He had invested thousands of dollars of his own money and time in trying to take the bar "out of the red" and make it a profitable business. He had made improvements in its services and its physical appearance. He was there fourteen or fifteen hours a day, seven days a week. Although there was no written agreement, he was, for all practical purposes,

in the process of purchasing the bar. He was a "silent partner" in the business, as Gillespie had testified. For the petitioner to argue that Young had no standing or proprietary interest in the premises is to ignore a record in this case which the Arizona Court of Appeals found "obvious". 661 P.2d, at 1141.

Thus, Mincey v. Arizona, supra, was not "mistakenly extended" in any way. It was properly applied by the Arizona Court of Appeals, after an appropriate factual determination by the trial court. The police entered and secured an alleged crime scene and then, hours later, proceeded to search the entire premises without a search warrant and without consent. That warrantless search was per se unreasonable and the Arizona Court of Appeals was required to follow the rule of Mincey v. Arizona, supra, as it did.

Finally, petitioner argues, apparently irrespective of Mincey v. Arizona, supra, that Young did not have an expectation of privacy in the ceiling tiles of the bar. This argument is made, once again, without support from the Fourth Amendment, case law or logic. If Young had standing to object to the warrantless search, the search of the premises was objectionable, no matter where the police searched. The police cannot properly search the ceiling of a residence, if they have no search warrant to search the residence. They cannot search the cabinet files in an office if they have no search warrant to search the office. If the Court were to accept the petitioner's premise, the result would gut the meaning of Mincey v. Arizona, supra, as well as numerous other cases of this Court interpreting the Fourth Amendment to the United States Constitution which

require a search warrant except in the most limited of situations. Unlike the "burglar" example of Rakas v. Illinois, 439 U.S. 128 (1978), Young was rightfully present in the bar, where he had a significant proprietary interest. His expectation of privacy under those circumstances, in all of the bar, was one that society was and is fully prepared to recognize as reasonable. The trial court in the instant case recognized it as such and so did the Arizona Court of Appeals. The latter court did not decide this Fourth Amendment issue in any way which conflicts with the applicable decisions of the United States Supreme Court. Therefore, there is no special or important reason, pursuant to Rule 17.1, for this Court to grant the Petition for Writ of Certiorari on this question.

CONCLUSION

For the foregoing reasons, factual and legal, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted this 6th day of July, 1983.

THOMAS A. THINNES, P.A.

BY Eleanor L. Miller
Eleanor L. Miller
1005 North Second Street
Phoenix, Arizona 85004
Phone: 602-257-8408
Attorneys for Respondent
Richard F. Young

CERTIFICATE OF SERVICE

Eleanor L. Miller, being duly admitted to practice before the Supreme Court of the United States of America, hereby certifies that one copy of the Brief of Respondent was served by depositing same in the United States mail, with first-class postage prepaid, on the 6th day of July, 1983, and addressed as follows:

Mr. Herbert E. Williams
Maricopa County Attorney's Office
101 West Jefferson, 4 Floor
Phoenix, Arizona 85003

Mr. Michael D. Jones
Arizona Attorney General's Office
1275 West Washington Street
Phoenix, Arizona 85007

who are the attorneys for the Petitioner herein. Said service was made on behalf of the Respondent Richard F. Young.

Eleanor L. Miller

ELEANOR L. MILLER
Thomas A. Thinnes, P.A.
1005 North Second Street
Phoenix, Arizona 85004
Phone: 602-257-8408
Attorney for Respondent

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THE STATE OF ARIZONA,

Petitioner,

vs.

RICHARD F. YOUNG,

Respondent.

NO. 82-2075

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, Richard Francis Young, by and through his attorneys undersigned, hereby requests permission of this Court to proceed in this matter in forma pauperis, pursuant to the Revised Rules of the Supreme Court of the United States, Rule 46. This motion is based upon the following memorandum and the attached affidavit, required by Rule 46.1 and in conformity with the Federal Rules of Appellate Procedure, Form 4 (adapted).

Respectfully submitted this 6th day of July, 1983.

Eleanor L. Miller

ELEANOR L. MILLER
Thomas A. Thinnes, P.A.
1005 North Second Street
Phoenix, Arizona 85004
Phone: 602-257-8408
Attorneys for Respondent

MEMORANDUM

Richard Francis Young is the respondent in the above-numbered and entitled proceeding, in which the State of Arizona, the petitioner, seeks a writ of certiorari from this Court to the Arizona Court of Appeals. The petition is without merit, as is set forth more fully in the response filed this same day.

Mr. Young has never previously sought leave to proceed in forma pauperis in any court below. However, the court should be aware that, subsequent to the dismissal of the charges against Mr. Young and throughout the state appellate procedures, Mr. Young has been indigent and unable to pay any fees or costs for legal representation. The fees for services rendered and all costs through the state appellate courts have been borne entirely by the law firm of Thomas A. Thinnes, P.A. Since this firm consists of only two attorneys, these expenses have been significant and burdensome. The firm can no longer afford to expend these valuable man-hours and costs without reimbursement, or possibility thereof, and will, undoubtedly, seek leave to withdraw as counsel on the state level once this case is eventually remanded.

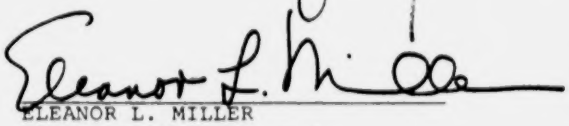
The law firm has felt compelled, morally and ethically, to continue representing Mr. Young through the appellate procedures because of its familiarity with the difficult issues in this case. However, to require it to continue its representation on the federal level, and bear all of the costs of the preparation and printed reproduction of briefs, motions, etc., would be an onerous financial

hardship, especially in light of the fact that Mr. Young is a respondent, not a petitioner. The petitioner, needless to say, has unlimited financial resources, a benefit few, if any, criminal defendants enjoy.

CONCLUSION AND REQUEST

Pursuant to the foregoing, and the affidavit attached hereto, respondent Young respectfully requests permission to proceed in this Court in forma pauperis.

Respectfully submitted this 6th day of July, 1983.



ELEANOR L. MILLER
Thomas A. Thinnes, P.A.
1005 North Second Street
Phoenix, Arizona 85004
Phone: 602-257-8408
Attorneys for Respondent

CERTIFICATE OF SERVICE

Eleanor L. Miller, being duly admitted to practice before the Supreme Court of the United States of America, hereby certifies that one copy of the Motion to Proceed In Forma Pauperis was served by depositing same in the United States mail, with first-class postage prepaid, on the 6th day of July, 1983, and addressed as follows:

Mr. Herbert E. Williams
Maricopa County Attorney's Office
101 W. Jefferson, 4 Floor
Phoenix, Arizona 85003

Mr. Michael D. Jones
Arizona Attorney General's Office
1275 West Washington Street
Phoenix, Arizona 85007

who are the attorneys for the Petitioner herein. Said service was made on behalf of the Respondent Richard F. Young.

Eleanor L. Miller

ELEANOR L. MILLER
Thomas A. Thinnes, P.A.
1005 North Second Street
Phoenix, Arizona 85004
Phone: 602-257-8408
Attorney for Respondent

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1982

THE STATE OF ARIZONA Petitioner, vs. RICHARD F. YOUNG, Respondent.	)	NO. 82-2075 AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Richard F. Young, being first duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed in Forma Pauperis without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe the petitioner state is not entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to the petition for writ of certiorari are true.

1. Are you presently employed? No

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. N/A

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. January-February, 1983; $5.00 hour; Chandler Material

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

Yes

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

From December 1981 to December 1982 received workmen's compensation in amount of $147.00 week. Subsequent to December 1982, did odd jobs, clean up at construction sites, hourly wage of $6.00 hour average. Total income from this latter source was approximately $3,000.00.

3. Do you own any cash or checking or savings account?

No

a. If the answer is yes, state the total value of the items owned.

N/A

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes

a. If the answer is yes, describe the property and state its approximate value. Automobile only: 1973 Oldsmobile - $600.00.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

RICHARD F. YOUNG

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

On this 2 day of [illegible], 1983, before me, a notary public, personally appeared RICHARD F. YOUNG, the person whose name is subscribed in the foregoing and who signed the same for the purposes therein contained.

[illegible]
NOTARY PUBLIC

MY COMMISSION EXPIRES:
9-16-85

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

JUDGE

CERTIFICATE OF SERVICE

Eleanor L. Miller, being duly admitted to practice before the Supreme Court of the United States of America, hereby certifies that one copy of the Affidavit in Support of Motion to Proceed in Forma Pauperis was served by depositing same in the United States mail, with first-class postage prepaid, on the 6th day of July, 1983, and addressed as follows:

Mr. Herbert E. Williams
Maricopa County Attorney's Office
101 West Jefferson, 4 Floor
Phoenix, Arizona 85003

Mr. Michael D. Jones
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1275 West Washington Street
Phoenix, Arizona 85007

who are the attorneys for the Petitioner herein. Said service was made on behalf of the Respondent Richard F. Young.

Eleanor L. Miller

ELEANOR L. MILLER
Thomas A. Thinnes, P.A.
1005 North Second Street
Phoenix, Arizona 85004
Phone: 602-257-8408
Attorney for Respondent